therefore not forbidden by law. The infringement of s. 9 of the Banking Act 1973 did not render the charge agreement a nullity. The plaintiff may be liable to a penalty imposed under s. 9(2) of the Banking Act 1973, but the penalty imposed by the said Act could not affect the charge agreement which the plaintiff was allowed to enter into under the 1948 Act.

These decisions would apply in the present case even if the plaintiffs had transgressed s. 11(2) of the Act (which I hold they have not) and the defence of illegality fails.

Consequently it is not necessary for me to have recourse to *Menaka v. Lum Kum Chum* [1971] 1 MLJ 91 where even though the statute provided that the contract was unenforceable the Court permitted recovery by applying s. 66 of the Contracts Act 1950.

Nor do I need to go into the niceties of whether because the contracts they executed was not merely one of guarantee, but one of indemnity, the second and fourth defendants are liable regardless of the alleged illegality. That issue would only have arisen for consideration, if the Court held the first defendant free from liability by reason of illegality.

These are the reasons why I gave judgement for the plaintiff for RM110,953.44 as claimed together with interest thereon at 8% p.a. from 9 October 1989 till realisation with costs both for this appeal and for the action and directed the first, second and fourth defendants to be jointly and severally liable.

For the avoidance of doubt, I informed the parties that this matter was adjourned into Open Court from Chambers and this is therefore a final judgement.

The counterclaim which the defendants have filed for alleged damages and costs in respect of the unsuccessful winding-up petition presented earlier by the plaintiffs, is really an unrelated matter and therefore, there will be no stay of execution pending the disposal of the counterclaim.

LOW TONG NAM

v.

SELVARAJU A/L PALINI & ANOR.

HIGH COURT, SHAH ALAM
DATUK WIRA WAN YAHYA BIN
PAWAN TEH J.
[CS NO. 23-53-90]
25 JANUARY 1994

TORT: Road accident - Vehicles travelling in opposite directions - Plaintiff encroaching into defendant's path - Reliance on oral evidence of plaintiff and defendant only - Plaintiff substantially to blame - Contributory negligence by the defendant.

This was a claim by the plaintiff for damages arising from a collision between his motor car and the defendants motor lorry.

The plaintiff claimed his car was travelling two feet from the centre of the white line on his side of the road, when an oncoming lorry, driven by the first defendant and owned by the second defendant, collided into his vehicle. On the contrary,the first defendant claimed that the plaintiff, while overtaking another vehicle parked on his side of the road, knocked into the front tyre of the defendants' vehicle. There being no testimony by any witness, the Court deliberated purely on the oral evidence of the plaintiff and the defendant together with the sketch plan.

Held:

[1] It is well settled principle of law that where there is a collision between two vehicles travelling in opposite directions on a road, then in the absence of special circumstances, there is a *prima facie* presumption that both drivers were negligent and the onus falls on each of them to show that the other driver rather than himself was negligent.

[2] The plaintiff was substantially liable based on the finding that the collision occurred while the plaintiff, overtaking a vehicle on its side of the road, strayed into the lawful path of the oncoming lorry without a proper look out.

[3] The defendant was not free from blame. The last minute action by the defendant to slow his vehicle could only have happened either because he was not paying sufficient attention to the condition and situation of the vehicle on

the road in front of him or he was travelling too fast, or both.

[Judgment entered for 20 per cent of the plaintiff's claim. Damages to be agreed upon or assessed].

Cases referred to:

Ong Yam Chong & Anor. v. Chan Wah [1962] 28 MLJ 184 ***(refd)***

Mohamad Bin Abdullah v. Cheah Hea Leng [1980] 2 MLJ 282 FC ***(refd)***

For the plaintiff - Christopher Foo; M/s. Murphy & Dunbar

For the defendant - Sivabalan; M/s. V.P. Nathan & Partners

JUDGMENT

Wan Yahya Bin Pawan Teh J:

This claim is in respect of a very unfortunate accident. The plaintiff, a lorry driver cum mechanic, was returning after the Chinese New Year holidays from his hometown of Kampar, Perak to his place of work at Kapar near Klang, Selangor when his motor car was involved in an accident in the early hours of 18 February 1983. The collision took place along Tanjong Karang/ Kuala Selangor road near Sungai Terap.

The plaintiff in his evidence testified that he was driving his motor car AW 6048 with two others as passengers from the direction of Tanjong Karang to Kuala Selangor when his motor-car was involved in a collision with motor lorry BBU 7336 coming from the opposite direction.

According to the plaintiff he had seen the lorry from about 100 ft away and that there were no other vehicles travelling in either directions in between both of them. He was about 2 ft from the centre white line on his side of the road when the lorry encroached into his lane and collided into his car. He agreed that both the lorry's and his own car's lights were on and the road was straight. Both were not in the process of overtaking any car. According to the plaintiff, as a result of the impact, his car spun twice before coming to rest on the road facing Tanjong Karang. He sustained injuries and was warded at the General Hospital, Klang. Later he sought treatment at the Sentosa Medical Centre, Kuala Lumpur.

The plaintiff underwent a series of operations. All in all he had a very extensive injury with skin loss over the right arm, right forearm, the right ankle and foot and a simple dislocation of the right hip. His main disability is on the right ankle and foot. The wounds have healed but the right ankle and foot are deformed to such an extent that it would be quite impossible for him to go back to work as a lorry driver or to perform heavy manual work.

During his cross examination, the plaintiff conceeded that at 6.30-6.45 a.m. it was fairly dark and his vision immediately before the accident, was restricted to about 30 to 40ft i.e. the distance covered by the low beam of his headlights. He also informed the Court that he had left Kampar at 4.00 a.m. in the morning in order to be at his place of work at Kapar near Klang by 8.00 a.m. the same morning. He first sighted the lorry when it was approximately 100 feet away from his car.

The plaintiff was the sole witness for his case as his two friends who were with him in the car at the time of the accident had gone overseas in 1986 and 1987.

The driver of the motor lorry in his evidence, stated that he was driving the second defendant's motor lorry ladden with bakau wood and proceeding from Klang towards Tanjong Karang. As he was approaching Sungai Terap he saw a motor car coming from the opposite direction.

Suddenly he saw this car overtaking another car parked on the same side of the road as the on coming car. The car then knocked onto the front right tyre of the lorry driven by him. When he saw the car driven by the plaintiff overtaking the car parked, he had a feeling that the car would knock into his lorry. So he applied his brakes but the unavoidable collision nevertheless took place. The car that came in the opposite direction was travelling very fast. As a result of the collision, the right front wheel of his vehicle jammed and his lorry landed in the drain on his opposite side of the road. He maintained that the accident took place on his correct side of the road and that he could not take any evasive action other than to brake.

Under cross-examination, the lorry driver said the road was narrow and he was aware of the oncoming motor car when it was 20 feet away. The collision took place suddenly. He vehemently denied the suggestion by Counsel for the plaintiff that there was no car parked on the same side of the road as that of the plaintiff and that the plaintiff was not overtaking the parked car.

The case for the plaintiff is solely dependant on his oral testimony supported by the sketch plan

(page 1 in Bundle "A"). To come to a finding on liability, I have to weigh the oral and documentary evidence of the plaintiff with that of the lorry driver, the first defendant, who incidentally is also the sole witness for the defendants.

This is an accident between vehicles travelling from opposite directions. It is well settled principles of law that where there is a collision between two vehicles travelling in opposite directions on a road, then in the absence of special circumstances, there is a *prima facie* presumption that both drivers are negligent and the onus falls on each of of them to show that the other driver rather than himself was negligent. *Ong Yam Chong & Anor. v. Chan Wah* [1962] 28 MLJ 184 CA and *Mohamad Bin Abdullah v. Cheah Hea Leng* [1980] 2 MLJ 282 FC

I have examined the oral testimonies of both the drivers and carefully scrutinised the documents in particular the sketch plan.

I am of the view that the plaintiff was substantially liable for the accident based on the following specific finding of facts:

(i) that the collision between motor car AW 8084 and motor lorry BBU 7336 occurred whilst the plaintiff was overtaking a motor car that was parked on the same side of the road as that of the plaintiff;
(ii) the collision took place on the side of the road in which the motor lorry was lawfully travelling;
(iii) the plaintiff failed to keep any or any proper look out when in his own testimony he stated that he saw the motor lorry about 100 feet away.

The lorry driver though subjected to severe cross-examination was unshaken on the question of the presence of the parked vehicle and the plaintiff overtaking the vehicle. His testimony is consistent with his police report (p. 27 Bundle "A").

I have studied the sketch plan (p. 1 Bundle "A") and observed that the brake marks of motor lorry BBU 7336 originated from the correct side of the road as the lorry was travelling. This is consistent with the 1st defendant's evidence that he was on his side of the road when he had applied his brakes on noticing the plaintiff overtaking the parked car and encroaching into the path of his motor lorry.

The plaintiff testified that he first saw the motor lorry from about 100 feet away. As mentioned earlier, both vehicles were on a straight stretch of road with their headlights on and that there were no other moving vehicles at that point of time. In such circumstances the plaintiff could have seen the defendant's lorry and the parked car at a much further distance than 100 ft away. Had he slowed down and stopped his vehicle to allow the defendant's lorry to pass, there would not be an accident at all. In all probability, the plaintiff was rushing to work after the holidays and having driven on a long journey at about 4.00 a.m. from Kampar he must have been very tired and in that condition he had failed to notice the parked car and having noticed it he had made an error in his judgment as to his ability to get past the car without having to encroach on the oncoming vehicle's path.

Albeit, the defendant is not entirely free of any blame. As stated in the earlier part of this judgment, he saw the car parked on the plaintiff's side of the road and the plaintiff's car about to overtake the parked car. He had anticipated at that very moment that the plaintiff's car would have encroached into his side of the road and be involved in a collision with his own vehicle and yet all he did was to apply his brakes. Apparently he did so when collision was inevitable. There was nothing to suggest that he could not do so earlier as the road was straight and from the illumination coming from his own head lights as well as the plaintiff's car the parked car could have been in the normal circumstances visible to him from quite a distance.

This last minute action by the defendant to slow down his vehicle could only have happened either because he was not paying sufficient attention to the condition and situation of the vehicle on the road in front of him at that time or he was travelling too fast under such circumstances, for both reasons. In so far as the excessive speed is concerned the length of the brake marks, the subsequent roundabout spinning motion taken by his lorry are strong indications of his fast driving.

On the evidential facts and inference drawn in this case I would hold that although the plaintiff himself is mainly responsible for the accident, the defendant is 20% liable for contributory negligence.

Accordingly I will enter judgment in respect of 20% of the plaintiff's claim only. Damages to be agreed upon or assessed.